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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

ELAINE KEITH et al.,  
  
Plaintiffs and Respondents,  
  
v.  
  
DALE HELLER,  
  
Defendant and Appellant.

2d Civil No. B235069  
(Super. Ct. No. CV 10-0325)  
(San Luis Obispo County)

Defendant Dale Heller appeals an order denying his motion to strike causes of action in a civil case filed against him by plaintiffs Elaine Keith and Randall Shepard. (Code Civ. Proc., § 425.16, strategic lawsuit against public participation (SLAPP).)<sup>1</sup> Keith and Shepard alleged several causes of action, including defamation and intentional infliction of emotional distress, relating to Heller's act of distributing packets of information to his neighbors about an injunction Keith sought against Heller.

We conclude, among other things, that the trial court erred because Heller met his burden of establishing that his actions were protected conduct that fell within the first prong of his anti-SLAPP motion. The court should have held a hearing on the second stage of the anti-SLAPP motion to determine whether Keith and Shepard had met

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<sup>1</sup> All statutory references are to the Code of Civil Procedure.

their burden of showing a probability of prevailing on the merits. We reverse and remand.

## FACTS

Heller and Keith were neighbors. They met in 2006 and live in a small rural community. They "became friendly and spent social time together." Shepard was Keith's boyfriend and business partner.

On November 20, 2008, Keith filed an application for a civil harassment restraining order. (§ 527.6.) She alleged that Heller wanted "a romantic relationship with [her]," but she told him she was not interested. She claimed he became angry, and Heller, among other things, used profanity, yelled, made sexual remarks, threats, came on to her property, took her dog, and drove his vehicle to force her off a road so he could talk with her.

On December 11, 2008, Heller filed a responsive declaration in propria persona. He denied committing any of the acts mentioned by Keith. He said Keith was motivated by "the myth that [he is] leading a community effort to stop her retreat/camping business . . . ." He objected to an injunctive relief order Keith sought that would allow her to use an "access road" to "drive . . . 3/8ths [of a] mile across [his] property in order to reach the intersection of that road with Highway 166."

On December 17, 2008, the trial court issued a restraining order against Heller prohibiting, among other things, any contact with Keith. It contained an order limiting Heller's right to use an "easement road known as 'Chimney Canyon Road' at the point where it crosses over . . . Keith's property." He could only use it for "a health or safety emergency." The court ruled that Keith and Shepard could use that easement road to obtain access to Route 166. The injunctive relief orders would continue in effect for three years.

In May 2010, Keith and Shepard filed a tort damage action against Heller. In an amended complaint, they alleged 10 causes of action; the last five were for defamation, false light, intentional infliction of emotional distress, negligent infliction of emotional distress and injunctive relief. They were based on the allegation that after the

December 12, 2008 restraining order hearing, and again in May 2009, Heller sent packets of information to other people about the action. Keith and Shepard alleged the second packet was sent "to 15 people in the rural [community] in which both plaintiffs and defendants reside." They claimed Heller "rearranged" transcripts and documents from the action to make it appear that they had "perjured themselves in court proceedings."

Heller filed a special motion to strike (§ 425.16) those five causes of action claiming they arose "out of [Heller's] exercise of his rights of free speech and litigation privileges afforded him" under the California and United States Constitutions. He said he sent the packets of information to obtain declarations to be used in current and threatened litigation.

The trial court denied the motion. It found that Heller had not met the first prong of the anti-SLAPP statute to establish that he was engaging in protected activity. It said, "The Court need not address the probability that Plaintiffs will prevail on the causes of action."

## DISCUSSION

### *The Anti-SLAPP Motion*

Heller contends the trial court erred by ruling that he had not met the first prong of his anti-SLAPP motion. We agree.

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 476-477, citing section 425.16, subdivision (b)(1).)

A trial court must "engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted." (*Episcopal Church Cases, supra*, 45 Cal.4th at p. 477.) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity." (*Ibid.*) "If the court finds such a showing has been made, it then must

consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Ibid.*) "We review the trial court's order de novo." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1262.)

### *The First Prong*

The first anti-SLAPP prong of protected activity includes "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . ." (§ 425.16, subd. (e).) "The statute does not require any showing that the matter being litigated concerns a matter of public interest." (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5.) Here Keith and Shepard's causes of action for defamation and false light are specifically based on Heller's distribution of packets of information to his neighbors about Keith's injunctive relief action. Keith and Shepard claimed Heller "rearranged" documents from that action in "such a way" as to "make [them] appear to be liars." "[A]n action for defamation falls within the anti-SLAPP statute if the allegedly defamatory statement was made in connection with litigation." (*Ibid.*)

Heller presented evidence that Keith and Shepard's claims arise from information he sent about a court case and his efforts to obtain evidence. "[S]tatements made in connection with or in preparation of litigation are subject to section 425.16." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.) "[C]ommunications in connection with anticipated litigation are considered to be ""under consideration or review by a . . . judicial body."" (*Neville v. Chudacoff, supra*, 160 Cal.App.4th at p. 1263.) The trial court found the packets Heller submitted "related to the restraining order action." But it ruled they were "not protected under the SLAPP statute," noting that "the hearing was over by the time Heller circulated the documents."

But Heller distributed two sets of packets. In the complaint, Keith and Shepard alleged Heller prepared both sets of packets *after* the restraining order hearing. But in Keith and Shepard's opposition to the motion to strike, they conceded that: 1) "the first packet was served days before the December 12, 2008 hearing," and 2) it "contained a letter drafted by the defendant asking his neighbors to provide declaration[s] in support

of him for use in the December 12, 2008 pending hearing." Heller's distribution of the first packet was protected conduct under the first prong of the anti-SLAPP statute (*Kashian v. Harriman, supra*, 98 Cal.App.4th at p. 908), and in Keith and Shepard's trial court brief, they essentially conceded that to be the case.

Keith and Shepard argue, however, that the packets Heller distributed in May 2009 were not protected because they could not be "connect[ed] with any pending litigation." Heller responds that there was an "open and ongoing" civil proceeding when he sent those packets. He argues that Keith and Shepard's claim that the proceeding was completed and final is undermined by their own action of later moving to modify that same injunction. Heller is correct.

The case against Heller was for injunctive relief. Heller was subject to a continuing injunction that could be modified or vacated at any time upon a showing of changed circumstances or other good cause. (*Palo Alto-Menlo Park Yellow Cab Co., Inc. v. Santa Clara County Transit Dist.* (1976) 65 Cal.App.3d 121, 130.) This is the case even if the injunctive relief order is contained in a "final" judgment. (*Ibid.*) The statute that authorized this injunction provides that it is "subject to termination or modification" on "the motion of a party." (§ 527.6, subd. (j)(1).)

Courts have recognized that there is "a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16." (*Kashian v. Harriman, supra*, 98 Cal.App.4th at p. 908.) The statute "has been held to protect statements to persons who are not parties or potential parties to litigation, provided such statements are made 'in connection with' pending or anticipated litigation." (*Neville v. Chudacoff, supra*, 160 Cal.App.4th at p. 1270.) It also protects communications relating to efforts to challenge or set aside prior judgments. (*Kashian*, at p. 908.)

Heller wrote to his "friends and neighbors" in the Rice Ranch area, a small rural community. He listed 21 claims Keith made in seeking injunctive relief. In their declaration in opposition to the motion, Keith and Shepard said Heller "sent the packet[s] to disparage [them] with [their] neighbors."

But from letters attached to the packets, a trier of fact could draw a reasonable inference about a different goal. Heller was asking for information relating to claims Keith and Shepard made in the action so he could use it in court. In those letters, Heller said, "If you have any direct knowledge supporting or not supporting any of these claims would you please *describe it on the attached DECLARATION forms . . .*" (Italics added.) He said, "If, after you read this, *you wish to provide the court some alternative information* to that in the complaint, I have included the proper forms." (Italics added.)

In his declaration in support of his anti-SLAPP motion, Heller said: 1) he was investigating and conducting research as part of his defense, 2) he was "gathering information that was known to the community . . . or specific community members about the lawsuit" and Keith and Shepard's accusations, 3) he wanted responses from his neighbors to assist him in his defense, 4) the allegations made against him were "outrageous," and 5) he was concerned about the injunction and about new "threatened criminal and new civil lawsuits against [him]" initiated by Keith and Shepard. He said that at the time he sent the packets, he was being "continually . . . accused" of wrongdoing by them. He noted that in the packets he delivered he included "court filed documents" to be reviewed by his "*potential witnesses*." (Italics added.)

Heller's procedure for obtaining witness statements may differ from methods used by law firms. But he was representing himself at that time. His methods may have been unconventional, clumsy, or unorthodox, but that does not defeat anti-SLAPP relief. Moreover, we do not weigh the evidence or make credibility determinations. (*Kashian v. Harriman, supra*, 98 Cal.App.4th at p. 906.) We simply determine whether Heller made a "threshold" showing that his acts were taken in furtherance of protected activities sufficient to satisfy this first prong of the anti-SLAPP statute. (*Ibid.*) We conclude he made such a showing.

A trier of fact could draw a reasonable inference that Heller was attempting to collect evidence to refute Keith and Shepard's claims and challenge the injunction. In his letters, Heller said the injunction was obtained based on Keith and Shepard's

allegations, but he wanted "to present to the court" information "that might provide another view."

Keith and Shepard suggest that because Heller never ultimately filed a motion to modify the injunction, he lost the right to make an anti-SLAPP motion. We disagree. The "statute applies to a cause of action 'arising from *any act*' of the defendant in furtherance of the [protected activity]." (*Peregrine Funding, Inc. v. Sheppard Mullen Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 674.) However awkward his attempt, Heller made a showing of an act in furtherance of protected activity--an attempt to obtain evidence to challenge a continuing injunction in a pending action. It is this act that forms the basis for Keith and Shepard's causes of action. A party should not be precluded from seeking anti-SLAPP relief from defamation liability simply because legitimate activity in furtherance of litigation may be incomplete, may turn out to be ineffectual, or because the plaintiff disagrees with the defendant's "approach to litigation." (*Bleavins v. Demarest* (2011) 196 Cal.App.4th 1533, 1542.)

Keith and Shepard suggest Heller's challenges to the injunction were not meritorious. But Heller's objection to the injunctive orders involving easement rights in a section 527.6 proceeding may arguably have merit. (See, e.g., *Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 808 ["potentially complex issues of real estate law such as rights and duties pursuant to an easement cannot properly be resolved pursuant to the summary procedures of section 527.6"].)

Moreover, as noted in the trial court order, here there was an "ongoing dispute between the parties." In his declaration, Heller claimed that he was also expecting future litigation when he sent out his packets. Defensive tactics taken "in anticipation of litigation" from an adversary may fall within the zone of protected activities. (*Peregrine Funding, Inc. v. Sheppard Mullen Richter & Hampton, LLP, supra*, 133 Cal.App.4th at p. 673.) Heller's fears about future litigation in May 2009 were well taken. In April 2009, Keith accused Heller of violating the injunction. She also moved to modify the injunction, and she later sued Heller for damages for causes of action relating to the injunction.

A statement concerning the subject of an ongoing dispute that is likely to result in litigation may fall within the "petitioning activity protected by section 425.16." (*Neville v. Chudacoff*, *supra*, 160 Cal.App.4th at p. 1268.) In his letters to his friends and neighbors, Heller expressed his fear of being subject to additional litigation by Keith and Shepard. In his declaration, he said he sent information to "potential witnesses" because Keith and Shepard were continually accusing him of wrongful conduct. He said he knew that Keith and Shepard had "run-ins" with people he was contacting and Keith and Shepard had made accusations against them, which were similar to the ones they made against him. Heller said he sent packets to his neighbors because some of Keith and Shepard's claims related "to actions that occurred at . . . community parties, and other commonly known events." The record contains some of the declarations Heller obtained from his friends and neighbors. This supports his position that he falls within the first prong of the anti-SLAPP statute.

#### *The Second Prong*

Because Heller met the first prong, the trial court should have proceeded to the second prong and decided whether Keith and Shepard met their burden to show a probability of prevailing on the merits. (*Episcopal Church Cases*, *supra*, 45 Cal.4th at p. 477.) It is at this stage where the plaintiff may present evidence to defeat the showing made by the defendant in the first stage of the anti-SLAPP proceeding. (*Ibid.*) The trial court erred by deciding to deny Heller's motion by only considering the first prong. Consequently, a reversal and a remand for the court to decide the second prong are necessary. (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 286.)

Keith and Shepard suggest the packets Heller sent were for an illegal purpose as part of his plan to continually harass them in defiance of the injunction. A defendant may not engage in illegal activity and claim it is protected activity under the anti-SLAPP statute. (*Kashian v. Harriman*, *supra*, 98 Cal.App.4th at p. 909.) But whether Heller engaged in such activity when he sent his packets is an issue for the trial court to decide in the second prong stage. After the defendant meets the first prong, "then the claimed illegitimacy of the defendant's acts is an issue which the plaintiff must

raise *and* support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case." (*Id.* at p. 910.) "[T]his is an *additional* burden which the plaintiff must address." (*Ibid.*) The plaintiff may satisfy this burden "by a prima facie showing of facts which, if accepted by the trier of fact, would negate" the defendant's showing on the first anti-SLAPP prong. (*Ibid.*) But "conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical." (*Id.* at pp. 910-911.) "If that were the test, the [anti-SLAPP] statute . . . would be meaningless." (*Id.* at p. 911.)

We have reviewed the parties' remaining contentions and conclude they will not change the result we have reached.

The order denying Heller's anti-SLAPP motion is reversed. On remand, the trial court shall consider and decide the issues in the second-prong stage of the anti-SLAPP motion. Costs on appeal are awarded in favor of Heller.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Charles S. Crandall, Judge  
Superior Court County of San Luis Obispo

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